

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(MR RABINDER SINGH QC Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 15 July 2009

BEFORE:
THE HONOURABLE LORD JUSTICE KEENE

BETWEEN:

THE QUEEN
ON THE APPLICATION OF
STAMFORD CHAMBRE OF TRADE AND COMMERCE

1st Claimant

and
FH GILMAN & CO

2nd Claimant

- and -

THE SECRETARY OF STATE
FOR COMMUNITIES AND LOCAL GOVERNMENT

1st Defendant

and
SOUTH KESTEVEN DISTRICT COUNCIL

2nd Defendant

MR M BEDFORD (instructed by Matthew Arnold Baldwin) appeared on behalf of the Claimant

MR J LITTON (instructed by Treasury Solicitor) appeared on behalf of the 1st Defendant

MR C ZWART appeared on behalf of the 2nd Defendant

Proceedings

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(Official Shorthand Writers to the Court)

No of Words: 7,332

No of Folios: 102

SUBMISSIONS BY MR BEDFORD

A MR BEDFORD: My Lord, I appear for the claimant. My learned friend Mr Litton appears for the Secretary of State and my learned friend Mr Zwart for the local authority.

I take it that you have seen my outlines of points.

B LORD JUSTICE KEENE: Yes I have, thank you very much.

MR BEDFORD: From the skeleton argument there was a list of essential reading, that is in folder 1, 2 at page 19. Can I ask a further question, which is did the court received a substituted skeleton argument to insert in there with the page numbers in the bottom right-hand corner legible? I am afraid they were cropped off on the earlier one.

C LORD JUSTICE KEENE: I certainly have one with page numbers one it, so it looks very much as though my clerk at least has put it in there.

MR BEDFORD: I am grateful.

D LORD JUSTICE KEENE: Of course, as you will understand, I have read the skeleton and I have read obviously the judgment below by Mr Singh, and I have also seen the Secretary of State's skeleton argument recently.

E MR BEDFORD: Indeed. On the documents can I just identify one additional document to those from the essential reading, which is from the council's Local Development Scheme, and there are references to it. Can I just pick up, it is page 64 in folder 2, tab 14. It is the forward to the Local Development Scheme published by the council. The first page simply sets out what the Local Development Scheme is. It says:

“This document explains the new system of local development frameworks.”

F But then over the page, page 65:

“The council is keen to maximise opportunities for the district communities and other interested parties to shape the contents of the new policy framework, and invite anyone interested in being involved in the process to contact the LDFT to register their interest and level of involvement.

G This version of the Local Development Scheme is a public document and provides the starting point for the local community and others to find out about the district council's programme for the preparation of the documents for the LDF over a three-year period.”

H Then the final sentence:

“In effect the LDS is the document which the public can use to find out what the district is proposing to do and when, and at what stage they can expect to be involved in the planning process.

My clients were then involved in the planning process, tab 17, it begins at page 87. It is a very lengthy representation but that is the representation they made to the local authority in relation to the local development framework, to get themselves involved in the preferred option stage, and they made their various representations. If you go to page 93 are their representations on transportation matters. You can see there is a series of detail points, (a), (b), (c), (d), (e), drawing attention first of all at (b) to the inclusion of the Stamford By-pass Relief Road in the Local Transport Plan. Paragraph (c) drawing attention to the feasibility study; similar in paragraph (d), identifying that they wanted specific reference to be made to the Stamford Eastern Relief Road by the council in their plan. Then:

“(e) Following on from the Stamford Eastern Relief Road your council should now be actively considering the inclusion in the LDF of the of the J&P Consulting proposal for a Northern Relief Road. Such a combination of eastern and northern relief roads will form the long awaited Stamford Outer Ring Road. It is essential that a protection corridor is established without delay, to ensure that the route of the Northern Relief Road is fully protected from random developments.”

The point about that, if you go back to page 42 in the same bundle (that is in tab 9) these were the JNP(?) representations which had been made in relation to transportation matters. On the right-hand side of the page in the black you can see a road corridor marked, and you can just see the beginning of the words “Rye” it has been cropped from the page in the margin, that is the Ryle Road.

LORD JUSTICE KEENE: Yes indeed, I have actually looked at the plans.

MR BEDFORD: Indeed, but the point that I am making is that the claimants were making representations to council about the need to protect the northern corridor because they clearly were working on the basis that the eastern corridor was already protected.

LORD JUSTICE KEENE: It certainly was in the statutory local plan.

MR BEDFORD: Indeed.

LORD JUSTICE KEENE: They existed at that stage.

MR BEDFORD: Yes, and they were working on the basis that because the council in their Local Development Scheme had said that the local plan policies would be continued until they were replaced by the LDF, that that would be maintained and that clearly was their understanding of the position.

What I have said in terms of the argument, and obviously dealing with the matters raised by Sir Richard Buxton in refusing permission on the papers(?) there is a question as to the formulation of the first issue. So far as the question is concerned

A what Sir Richard Buxton said is, “Well even if I am right in my submissions that the proper issue to examine is whether it was lawful for SKDC to change the announced policy, seeking to change T1 without consultation” rather than simply whether there was a promise of consultation, then Sir Richard Buxton said effectively I am still wrong because of the reasons that the judge gave on his paragraphs 88-90.

B Clearly I do say that the correct question was the question as I have formulated it. Dealing with those three reasons, the first was the fact that this is a statutory field, there are published policy requirements for consultation and statutory requirements for consultation, and because there is not one that covers this situation that is strong indication there is no such requirement. As I seek to say, in the context of the correct question given the announced policy of SKDC, that was very specific to SKDC and to its particular intentions and timetable for replacing its local plan policies. I say it is unremarkable and not, therefore, a factor against me that there was no statutory or published quality requirement to spell out what course SKDC should take when their timetable slipped and what they had originally said they would do they could no longer do.

C It is a short point but I say quite simply that first factor does not count against me because this was an unusual situation, and so it is not surprising there was no published policy advice or statutory (overspeaking)

D LORD JUSTICE KEENE: You say it is unusual. I mean what evidence is there that it is unusual?

MR BEDFORD: It is unusual in the sense that the specific matters that I attack are the specific representations made by the local authority in its LDS. Then what happened was it was not able to adhere to its timetable. That was specific to it and its programming.

E LORD JUSTICE KEENE: It changed, therefore, what it said would be the position in its LDS.

F MR BEDFORD: Yes. But what it did not do was actually publish anything to change that, because the statutory regime would have required it to review its LDS, bring forward new documents, and that would have flagged up those issues. The position here is that the council did not actually do these things. What I am saying is it is not surprising that the statute does not spell out a requirement for consultation where you have announced a promise to maintain your local development plan until you produce you DPD, because that is simply something that SKDC chose to do, that is how they went about producing their development plan. It is not something which is necessarily of wider remit. So far as the second --

G LORD JUSTICE KEENE: Just one moment. I am just going back to check the statements that you rely upon. You have the LDS itself, which had that general statement about policies being saved and replaced on a rolling programme, and saving the existing local plan in its entirety.

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A MR BEDFORD: Then it is the AMR, which is at tab 16 and, within that, page 84, paragraph 322 and then page 85 the appendices, and it is the paragraph immediately under section 6 and then the table itself.

LORD JUSTICE KEENE: Yes, but that of course is just a monitoring report, is it not?

B MR BEDFORD: My Lord, it is a monitoring report but it is significance, it is rather wider, the statutory regime first of all not only makes it a statutory requirement that it is submitted, this data made public. Secondly it makes it a statutory requirement that if there are policies which the local authority is not implementing they should be identified in the AMR and there should be a statement by the council as to why it is not implementing the policies and what its proposals are, either to remove the policies or to replace them with something else. This AMR did not say anything about policy T1 in terms of it not being a policy that was being implemented. Nor did it say it is a policy which is being removed. What it said was it was going to be replaced by the DPD.

C LORD JUSTICE KEENE: As indeed it would be.

D MR BEDFORD: It would not be in this sense, because the local authority, by failing to request its saving, it had gone from the development plan before they had actually produced a DPD.

LORD JUSTICE KEENE: The position is of course that under the transitional arrangements local plan policies would automatically disappear after three years, unless they were going to be saved by the Secretary of State.

E MR BEDFORD: Absolutely, but the key question is the Secretary of State was given a power to disapply that automatically.

LORD JUSTICE KEENE: Yes, exactly.

F MR BEDFORD: The issue that I am concerned with is the approach the local authority took in making their requests, because it is quite clear the Secretary of State relied heavily on the local authority to inform her as to which policies they wished to have saved or not. In this circumstance, the local authority having made the public promises that it was keeping all of its policies did not then revisit that and consult with people when it changed its position.

LORD JUSTICE KEENE: Did it consult before it made that statement that it would --

G MR BEDFORD: No.

LORD JUSTICE KEENE: Bear with me. Did it consult before it made the statement upon which you rely in the LDS?

H MR BEDFORD: It did not consult before it produced its LDS, but having produced its LDS the purpose of the LDS, as you identified, was to inform the public, as it expressly said, what it was going to do and when. Clearly, in my submission, the public is entitled to rely on those statements on what is obviously an important

A participatory process. If you step back just for a moment from the detail, the position in relation to local plans was that they were very much matters whereby the public have a say in the production of a local plan at all the stages until it gets adopted.

LORD JUSTICE KEENE: Absolutely. As it will in the new plans as well.

B MR BEDFORD: Absolutely, but the inter (inaudible) this mechanism the public was shut out of that, albeit the local authority had given the indication that they would not be, because the local authority had said to the public, "All our policies are going to be saved until they are replaced".

LORD JUSTICE KEENE: That is because the statutory and regulatory framework makes no provision for public involvement in the transitional period, does it?

C MR BEDFORD: It does not, but the local authority, having said that that is what it intended to do, then changed its position entirely. My Lord, in those circumstances my submission is --

LORD JUSTICE KEENE: But you had not been consulted on that in first place, had you?

D MR BEDFORD: What we had been consulted on was the local plan, which had led to the establishment of the policy. We have then obviously seen the LDS is produced to the public; that says what they are going to do. There is a mechanism which allows them to change that, which they did not adopt. We then are in the position that without any reference to the public, or indeed any consultation with anybody, the policies that they said they are keeping, they failed to request them to be kept. In those circumstances, as I say, we are shut out. I quite accept that there was no statutory requirement requiring us to be consulted, but when one looks at the position of the local authority, one looks at the promises it made. In my submission it follows, given the circumstances of this case, that they did have an obligation to consult if they wanted to change their published position.

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F LORD JUSTICE KEENE: If the converse had been the situation and they had said in the LDS that they were not proposing to save it, and they then decided they would request the Secretary of State to save it you say that would apply then as well.

G MR BEDFORD: If they had said they were not proposing to save it we would have been put on notice that that was their position and so we would have then known that it would be up to us to do something if we wanted to have that policy saved. Clearly that is not the situation when they have said they will be saving that policy.

LORD JUSTICE KEENE: All right, thank you. That is the first ground, is it not, the first issue?

H MR BEDFORD: I go on, because obviously Sir Richard Buxton gave further reasons as to why he said that my position would not succeed. The first one was actually the absence of a statutory requirement to consult, the second was, as it were, what he saw as the logic of my position, that if it applied to this policy then it would apply

A not only to the other policies in the local plan but also to other local authorities. My response to that is to draw attention to what is specifically said in both R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363 and R (Roberts) v Secretary of State for Communities and Local Government [2009] JPL 81, about these being case-sensitive, fact-sensitive decisions, and what is fair --

B LORD JUSTICE KEENE: You talk about what Sir Richard Buxton said, are we looking at the same document?

MR BEDFORD: I hope so, my Lord.

LORD JUSTICE KEENE: I am looking at his grounds for his reasons for refusing permission on the documents. I do not think he spells out in terms anywhere there or emphasises the absence of any statutory requirement to consult, does he?

C MR BEDFORD: In issue one it is the final sentence.

LORD JUSTICE KEENE: I see.

D MR BEDFORD: That cross-reference to paragraphs 88-90 of the judgment, and it is those three paragraphs of the judgment give rise to the three reasons that I am seeking to deal with. I say 88 is the one that deals with statutory consultation, 89 is the one that deals with what is said to be the logic of my position and then 90 is the one that deals with fairness and it said, "Well you could have made the representations yourself".

E LORD JUSTICE KEENE: Yes. The fact is there is a very elaborate set of requirements in relation to consultation and all sorts of stages in the local plan process, is there not?

MR BEDFORD: There is indeed.

LORD JUSTICE KEENE: Both under the old system and under the new.

F MR BEDFORD: Indeed, but in my submission, although it is a factor it is not a conclusion to draw from that that there can be no extra statutory requirements for consultation if the public law principles so apply.

LORD JUSTICE KEENE: No. But it is, nonetheless, a relevant consideration, is it not?

G MR BEDFORD: Yes, but I have dealt with it, as I say, if you look at the specific circumstances I say it is unsurprising that there was not a requirement.

H Dealing with the logic position, which is the second reason, what I say (this is paragraph 10 of my note) whilst I accept that their announced policy applied to all local planning policies, T1 was in a special position, given its subject matter was to protect an external bodies road scheme, i.e. the county council's road scheme. It was directly relevant to the acceptability of what at the time were live development proposals and it was a policy that we were relying on specifically in opposition to their proposals. I say it was obviously crying out loud that if you

were going to do anything to T1 it was going to impact directly on external parties, obviously the county council because it was their road scheme, obviously us because we were relying on it heavily in opposition to a current planning application.

At paragraph 11:

“No indication that any other SKDC local plan policies were in a similar position or a decision not to request their saving would have similar consequences for external parties, who would be prejudice by the abandonment of those policies without consultation and equally or more so with no indication that other local planning authorities had announced similar policies for saving their local plans, pending their replacement by DPDs.”

I say there is not basis for assuming that the obligation would be wide ranging. I then go on to say, well if it were that there were people in a similar position, the fairness of my position is that I should have been consulted, then equally I say that would apply to others.

The third reason is the unfairness point where it said, “Well it is not unfair to you, because you could have taken the initiative to request the saving yourself”. What I say about that, plus I accept that it is a factor, because this is a case where the SKDC had announced its policy position in statutory documents which had been heavily relied on by the public, it had made not public statement to intimate it was abandoning that position. The published procedures of the Secretary of State gave special status to the requests made by local planning authorities, and made no reference to the role of other parties to make unsolicited requests for saving. I say in those circumstances it would be unreasonable to expect a claimant to have taken the initiative to guard against the possibility that SKDC would abandon its published position.

Sir Richard Buxton clearly does not deal with issue 2, because of his conclusions on issue 1. I know my learned friend does. Perhaps I can turn to that in a moment. So far as issue 3 is concerned, I quite accept that if one is dealing with the matter simply in terms of rationality then I would have an uphill struggle in showing that it is not a response that could be reached simply in terms of Wednesbury unreasonableness. Rationality does not operate in a vacuum. It is also incumbent on a decision-maker who is charged with a decision to correctly inform himself as to the relevant considerations before he exercises that discretionary judgment and to take into account what is relevant and not that which is irrelevant. What I am saying is that the Secretary of State knew, because the documents were before her because at the time, the position in relation to the LTP, the position in relation to what SKDC had said in the original local plan, the position as to what SKDC had said in the LDS and in the AMR, and putting those together it was perfectly clear that when SKDC said to the Secretary of State, “There is no need for T1 because all road schemes have been completed” that was obviously inconsistent with the other information that she had. In those circumstances the Secretary of State could not simply, as it were, accept that position, she had to consider the AMR and consider the LDS together with the other information, before reaching a judgement.

LORD JUSTICE KEENE: It must have been pretty obvious that T1 was not being pursued, must it not?

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MR BEDFORD: No, because the nature of T1 is although it was to protect a county council road scheme, you implement T1 simply by refusing planning permission.

LORD JUSTICE KEENE: You are protecting the corridor.

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MR BEDFORD: Yes, exactly. In those circumstances it is not obvious, because no doubt one knows that the road scheme has not been built and one knows it is no more than a feasibility proposal in the LTP, but so far as the local authority was concerned they were not saying, "We are not implementing this policy. We have decided not to safeguard the road corridor any more". Because they had not said that in their AMR and we know, and the Secretary of State knew, that the Highway Authority was proposing the feasibility scheme, which would bring forward a road proposal along the line of (overspeaking)

C

LORD JUSTICE KEENE: Am I not right in thinking that what went to the department was a schedule which set out both those policies which the local authority wanted to see saved and those authorities which it did not want to be save?

MR BEDFORD: That is right.

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LORD JUSTICE KEENE: And listed amongst those that it did not want to be saved was policy T1?

MR BEDFORD: Yes. That is right, but what I --

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LORD JUSTICE KEENE: So the Secretary of State cannot have been under any illusion as to what she was doing.

MR BEDFORD: What I am saying is the Secretary of State failed to take into account what the council had separately said in its LDS and in its AMR, and specifically in its AMR where it did not identify this as a policy that it was not implementing. Coupling that with --

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LORD JUSTICE KEENE: But you seem to be saying the Secretary of State (when we talk about the Secretary of State we actually mean the department's official, particularly in regional office) were unaware that this represented a change. Is that really what you are submitting?

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MR BEDFORD: Yes. What I am saying is that the Secretary of State was aware, from the LTP, there was a proposal for a feasibility study in relation to this road corridor, which was expected to take place in the period to 2011, that was the timeframe in the LTP. So far as the local authority was concerned they had not said in their AMR, "We are no longer implementing T1 because it is a dead duck. We are not safeguarding the road any more". The Secretary of State knew that. Then she receives the representation from the local authority saying, "T1, although it meets your requirements" because they ticked the boxes which said that it met

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the criteria, one of which is necessary, they then said, "it is not necessary to save because all schemes expected to be completed have been".

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In my submission, the Secretary of State, knowing what she already knew from those other sources, if you took those into account the Secretary of State was obliged to say, "Well there is an inconsistency here".

LORD JUSTICE KEENE: You are really, I think, saying that the department's officials must have thought that the road had been constructed?

B

MR BEDFORD: I doubt that, because one can --

LORD JUSTICE KEENE: Absolutely, I doubt it too. I would have thought it must have been pretty obvious that the regional office would have very clear ideas as to what had and had not been constructed, because the money comes from Central Government, after all.

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MR BEDFORD: Indeed. But what the government office should have done is said, "Look, it is inconsistent. How can you say local authority in relation to a scheme which is not your own scheme, it is not expected to be completed, when we know firstly that the LTP says that it is still the subject of a feasibility proposal and secondly, we know you have not told us that you are not implementing this policy?" What I say is they should not have accepted, if they would have properly taken into account the material considerations that were before them, the decision that was put to them by the local authority.

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The explanation which appears to be given by Mr Foster, who is the government official concerned is, "Well these other documents, with the exception of the LTP were not considered because there were too many of them and it would have been too time consuming to look at them". In my submission, given the statutory role of those documents (I put it, as it were, rhetorically) what on earth is the point of asking the local authority to inform the Secretary of State of the progress it is making on its DPD documents and to identify to the Secretary of State the policies it is and is not implementing, and to identify for the Secretary of State of the policies it is not implanting why not and what it is proposing to do about that. What on earth is the point of doing all of that if the Secretary of State takes no notice of it when it comes to the key decision about those policies which is should they be saved or not saved. (pause)

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LORD JUSTICE KEENE: Yes, all right.

MR BEDFORD: Issue 2, which is the one that my learned friend obviously maintains that it was not properly dealt with in the judgment at first instance.

G

The position, in my submission, is simple. What I am saying is that because the local authority, if I am right on issue 1, made a flawed decision and gave rise to a legitimate expectation in my favour, and the documents that relate to that were documents in front of the Secretary of State, what I say is the Secretary of State had her own obligation to consider whether because she wanted to rely so heavily on what the local authority was saying she had her own obligation to consider whether what the local authority had put before her was tainted by a failure to comply with that legitimate expectation.

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A My learned friend, as it were, seeks to draw a line between the Secretary of State and the local authority and say, "Well even if the local authority was wrong you cannot lay anything at my door". My learned friend seeks to rely on (I think this is the case) Blog 61(?) which is at tab 5 in the divider. That was a very different case, my Lord, because what that concerned was police officers making representations to a prisoner about how the Probation Service would manage his prison sentence, were he convicted. What, in that case, the claimant then sought to do was to say there was a legitimate expectation had been raised by those officers that he could lay at the door of the Prison Service.

B That is not my case. What I am saying is that the Secretary of State herself knew the things which gave rise to the legitimate expectation against the local authority. As it were, the clear line is not there, and it is for those reasons that I say if the Secretary of State wanted to rely (and she did rely heavily) on the local authority she is tainted by the defect in their decision making.

My Lord, those are my submissions.

C LORD JUSTICE KEENE: Thank you. Mr Zwart, I think.

MR LITTON: Mr Litton, for the Secretary of State, Mr Zwart is for the local authority.

LORD JUSTICE KEENE: Yes, I know, but I think Mr Zwart is the person I want to ask some questions of, if you do not mind, Mr Litton.

D MR LITTON: Certainly, my Lord.

LORD JUSTICE KEENE: Mr Zwart, reading the papers I get the impression that the decision to, or not to, request the Secretary of State to save policy T1 was not one which was the subject of any committee resolution, is that right?

E MR ZWART: That is as I understand the position, yes.

LORD JUSTICE KEENE: It was an officer's decision and that the communication was sent, therefore, to the department without any public announcement?

MR ZWART: Yes, that would be so.

F LORD JUSTICE KEENE: One of the things, or possibly the only thing, that actually troubles me at the moment, is whether in fact interested parties like the applicants actually did realistically have an opportunity to make representations to the Secretary of State before she made her decision one way or the other. I know in terms of time they had the opportunity, but whether they actually had a real opportunity would depend on whether they knew what was happening, would it not?

G MR ZWART: Yes it would, my Lord. So far as I can assist, because I was --

H LORD JUSTICE KEENE: Was there any public pronouncement of any kind made that would have alerted interested parties to the fact that the Secretary of State was being asked not to save T1?

A MR ZWART: No, my Lord, there was certainly community involvement (which you will have seen from the papers) essentially published the way forward, if I can put it, mutually as to community engagement. That was to involve the community in the process. (inaudible) essentially identify individuals appears to the claimants. It is clear from the representations by Mr Bedford --

LORD JUSTICE KEENE: Where is this in the documents? Just give me the reference.

B MR ZWART: It is my tab 18 of the appeal bundle. What you will see at tab 18 --

LORD JUSTICE KEENE: Tab 18 in folder 2 that I have is a letter and the protocol.

MR ZWART: There is a statement of community involvement.

C LORD JUSTICE KEENE: Yes I have seen that somewhere. I think it is 15 in my bundle.

MR ZWART: It is page 72, if that helps.

LORD JUSTICE KEENE: That is it, yes. This is April 2006, which is before the letter goes to the department, as I understand it.

D MR ZWART: That is right. We will see at page 73 there is an introduction that explains the new regime; paragraph 2 that explains the new framework; paragraph 3 describes what the statement is. I highlight that it is a statement involvement as opposed to consultation. Then it describes in essentially broad terms how the community will be engaged in the process. Over the page at paragraph 7 there will be a review and it says at paragraph 7.1:

E “Any review of the document will necessitate following statutory procedures of public involvement, submission to Secretary of State, examination and adoption.”

F Paragraph 8, “What will the community be consulted on?” At paragraph 8.1 it is the South Kesteven local framework. The statement, “What will the community be consulted on?” I understand to mean an example of engagement of the community by its involvement.

G LORD JUSTICE KEENE: I see all that, and I can see that the public is being told that it will be involved in the preparation of the new plans under the new system. So far so good. This does not appear to be addressing the transitional arrangements, and no doubt that in a sense is your point, a negative one, that it does not promise consultation on that.

MR ZWART: That is correct.

H LORD JUSTICE KEENE: That is fine, but you are not really addressing the point that troubles me at the moment which is, okay, there may not have been any promise to consult expressly on this, but you have a situation where you have a local plan policy under the old system, which has been through all the statutory processes

A with public involvement. You have a statement by your authority, which says that in effect we propose to maintain this policy during the transitional period. That then changes (as of course your authority is entitled to change its mind on what it wants the minister to save or not save) but I am still trying to get my head around what sort of publicity was given to this move on the part of the authority. You do not need to tell me that there is no statutory or regulatory requirement to publicise, I accept that, but it goes to a more general notion of fairness by bodies such as the Chamber of Commerce who clearly were relying upon the statement that you were proposing to request the saving.

B MR ZWART: That is right. As far as I understand the position, at page 169 you will see the 29 March 2007 letter.

LORD JUSTICE KEENE: This is the protocol?

C MR ZWART: This is a letter from the council.

MR BEDFORD: It is 169 in folder 1 which is your tab 14 folder.

MR ZWART: This is addressed to government office. I accept that there appears to be no notification to the claimant itself.

D LORD JUSTICE KEENE: Not merely no notification to the claimant, but I have read the witness statement from the officer concerned of your authority, and of course he was seeking to apply the criteria that had emerged from the department as to what polices would quality for saving and what would not, and went through those and sends the thing in. Was there any publicity at all given to the fact that the council was not seeking the saving of policy T1?

E MR ZWART: No, my Lord, there was not.

LORD JUSTICE KEENE: There is no council minute or anything like that?

MR ZWART: No.

F LORD JUSTICE KEENE: There was no committee meeting at which the public could attend; it is all a bit “huga muga”, is it not? That is what concerns me. If I may say so in a rather rude fashion on most of Mr Bedford’s other arguments, but hat broad fairness point does trouble me. Do you want to say anything more about it?

G MR ZWART: My Lord, no, other than supporting the Mr Singh’s point that one has to appreciate the context of fairness has to be considered in all circumstances. As Bryce LJ(?) pointed out, the planning regime is populated by many specific requirements for (overspeaking)

LORD JUSTICE KEENE: Absolutely. I quite agree. That is a powerful reason.

H MR ZWART: Therefore general phase(?) is to be seen in that context, my Lord.

LORD JUSTICE KEENE: All right. Mr Litton, on the matter that troubles me, is there anything you want to say?

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MR LITTON: My Lord, I do. It is simply this. I do not accept, in a sense, that there is some sort of freewheeling concept of general fairness in respect of which one can identify a breach here, which is not said by the claimants to be rooted in an alleged breach of legitimate expectation, because what my learned friend's argument is, is whether there was an express, and he accepts that there was no express requirement for consultation. What he seeks to argue is that there was in effect an inferred promise of consultation as a consequence of statements made by the council, that it would save the entirety of its local plan in the period before it (several inaudible words). As a consequence of that there is to be inferred a promise that before it changed its position it would consult. So it remains rooted in (overspeaking) expectation.

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LORD JUSTICE KEENE: Yes, you say consult. One of the points that has been made, which seems to me to have potentially some force from your side, is that there was the opportunity to make representations to the Secretary of State.

MR LITTON: Certainly there was.

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LORD JUSTICE KEENE: I am thinking of the Roberts. There was in terms of time, but only of course if one knew what was happening. I get the impression that there was not even any publicity for the fact that the request had gone in, whatever the contents of it were, whether the request was for certain parts of it to be saved or not.

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MR LITTON: My Lord, as far as I am aware there was not any publicity that such a request would be made. But again, that has to be put the context, as you have quite rightly identified that the statutory mechanism was such that unless the secretary of state made a saving direction those policies would have automatically expired after the three years, in any event. That immediately tells one in a sense that the onus is then put on the local planning authority if it wishes to save those policies to make an application and explain why a particular policy should be save by the Secretary of State. For anyone who was out there (and they must be as aware of the protocol as any other party) they would be aware that for a policy to be saved there would be an application made by the local planning authority for that direction and that that would have to necessarily be made prior to the cut-off date, 27 September 2007. It would be perfectly open --

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LORD JUSTICE KEENE: But if you are a chamber of commerce interested in this particular safeguarding you would not think there was any great need for you to do something if you thought the planning authority itself was already going to be requesting the saving of that policy, would you?

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MR LITTON: If you were particularly concerned, and in this context the Chamber of Commerce was particularly concerned, because my learned friend has identified that policy was also relevant to a whole series of development control applications that were being made, which absent the policy might have an impact on that road, then you might well take the precaution of just asking the local authority, "We are

A aware that these policies are due to expire shortly via the statutory regime, has an application been made?” Because of course the mere fact that the local authority makes a request is not to say the Secretary of State will actually accede to that request because has independent judgement as to whether or not that policy should in fact be saved. If you had a particular interest in the matter, in my submission, it is not unreasonable to think that that body might well ask, “Have you made a request? Could we see it, because we know that the policy will come to an end by virtue of the legislation and we just want to see whether or not (a) you have made such a request and (b) if you have made a request to say what we might be able to bring to the party in terms of representations to ensure that the Secretary of State accedes to that request”.

B There is certainly that opportunity and Roberts is in a sense a case of that, because there it was a particular developer who is anxious to retain the district allocations in the structure plan to support their planning application that they had made for a green field development, who were very anxious indeed, made themselves, independently, they requested the Secretary of State that that policy should in fact be saved prior to the cut-off date.

C I do say that notwithstanding that there are very broad statements made in the LDS, or the local authority as to what it was going to do. You have rightly identified there is no statutory requirement for consultation, there is plainly no express promise of consultation in relation to the saving of those level plan policies. The inference that my learned friend seeks to draw is one which, in my submission, does not then simply trigger some freewheeling concept of natural justice, it remains a question as to whether or not there has been a breach of a legitimate expectation, albeit that the legitimate expectation is created through inference rather than expressly. When one puts it in that way the learned judge’s observations, and Sir Richard Buxton’s observations endorsing that, all apply, in my submission.

E LORD JUSTICE KEENE: Thank you.

MR LITTON: I am grateful, my Lord.

(Judgment given)

F LORD JUSTICE KEENE: Time estimate. Is it going to be a day? How long did it take before?

G MR BEDFORD: It was two full days before the judge. Given that everything is going to be raise, my Lord, and we, in any event, have reserved our position in relation to some subsidiary argument (overspeaking) feel he needs to deal with then I think it is certainly going to be a day.

H LORD JUSTICE KEENE: It will be a day but I would think you are likely to get someone in the constitution who is familiar with this area of the law and in that situation, and bearing in mind that this court reads its papers thoroughly in advance I would have thought one can get through this in a day. What do you want to say on that, Mr Litton?

A MR LITTON: Clearly as you have indicated much of the arguments should be focused. I take my learned friend's point that there are some additional arguments that he wishes to develop in the event that I get, as it were, so far, but I think a day with a fair wind. I mean one has to always be a little bit cautious, but I am sure if we all put our minds to it.

LORD JUSTICE KEENE: Yes. Any contribution, Mr Zwart, to make on this?

B MR ZWART: No, my Lord, a day would be satisfactory, because by the time it ultimately gets to the Court of Appeal the issues will have been crystallised.

LORD JUSTICE KEENE: That is what I was thinking, they should be focused by that stage and it may be Mr Bedford will concentrate his fire in the areas where he thinks it can be most effective.

C All right, time estimate one day. It will be either three LJs or two LJs and a High Court judge on the constitution. Cost of today, costs on the cause. Anything else that we need to deal with? Associate, have I overlooked anything.

ASSOCIATE: No, my Lord, I cannot see anything.

LORD JUSTICE KEENE: All right. Thank you very much indeed.

D (Hearing concluded)

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